to the contrary, I am entitled to assume that the administration has been completed long since, and that the respondent, who was originally executor and trustee, now functions in the latter capacity only. It may be that the applicant is entitled to make an application under the Trustees Ordinance, but with that I am not concerned.

I am satisfied that the application to revoke the probate is misconceived and must be dismissed with costs.

Motion dismissed.

Solicitors for applicant—*Chan and Eber.*

Solicitors for respondents—*Braddell Brothers.*

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, Ag. C.J.

December 7, 1940.

REX v. J. W. LIM.

[SINGAPORE MAGISTRATE'S APPEAL No. 113 of 1940]

Liquors Revenue Ordinance (Cap. 225)—Sec. 38—Selling of intoxicating drinks on unlicensed premises.

When a restaurant waiter goes outside the restaurant and purchases liquor elsewhere for a customer of the restaurant the sale of liquor takes place where the liquor is appropriated for the purpose of the customer and where the money is paid. Assuming that the restaurant proprietor has no interest in the shop where the liquor is sold or in any profit derived from the transactions there is no sale contrary to s. 38 of the Liquors Revenue Ordinance (Cap. 225). The mere consumption of beer on unlicensed premises is no offence.

Quaere, whether under s. 310 of the Criminal Procedure Code the Court can entertain an appeal by the Crown.

Cases referred to:—

(1) *Ibrahim* v. *Public Prosecutor,* (1932) 2 M.L.J. 46; (1932) F.M.S.L.R. 349.
(2) *Jones v. Mighall,* 48 T.L.R. 636.
(3) *Morgan & Ors. v. Licensing Justices of Aylesford,* (1906) 1 Q.B. 437.
(4) *Pasquier v. Neale,* (1902) 2 Q.B. 287.
(5) *Pletts v. Beattie,* (1896) 1 Q.B. 519.
(6) *Pletts v. Campbell,* (1895) 2 Q.B. 229.
(7) *Taylor v. Oram,* 7 T.L.R. 68.

MAGISTRATE'S APPEAL.

John Laycock for accused.

E. N. Griffith-Jones (Crown Counsel) for the Crown.

In this case the accused was charged with permitting the sale of intoxicating liquor on his premises, the Monico Cafe, which were unlicensed premises. After hearing the evidence the Magistrate convicted the accused. He was not informed of any previous conviction and he sentenced the accused to pay a fine of $200.00 and costs. A short time after his announcing sentence a Police Officer came into the Court with a certificate of previous conviction which he produced to the Magistrate but the Magistrate pointed out that having passed sentence he was *functus officio* and could not then alter his sentence. He advised the Crown to appeal against the sentence and the Crown did so.

When the appeal came on for hearing reference was immediately made by the Acting Chief Justice to s. 310 of the Criminal Procedure Code.

John Laycock (for accused) submitted that the relevant section of the Criminal Procedure Code could make no provision for appeals by the Crown against sentence only. Section 322 of the same code while dealing with revisions only gave the Judge power to exercise the powers conferred by s. 305, s. 309, s. 310 and s. 311 of that code which merely refer back to s. 310 which again made no provision for appeals against sentence. He therefore contended that the appeal against sentence by the Crown did not lie. He further argued that in any case the conviction was itself bad on the facts as proved. The customer had gone into the Monico Cafe and sent one of the waiters out to buy him a bottle of beer. He paid the waiter $1.00 and the waiter went across the road and purchased a bottle of beer at a shop for 70 cents. The waiter never accounted to him for the balance of 30 cents. The proprietor of the restaurant had no interest in the shop and made no profits from the sale of the beer. He submitted that the waiter was the agent of the customer for the purpose of buying the beer and that the sale took place in the shop where the beer was appropriated to the customer and where the money was paid for the beer. He submitted that what the waiter did with the extra 30 cents was no concern of the restaurant proprietor unless he made a profit thereby and in this case the evidence clearly proved that he did not. He referred to the following cases, namely, *Morgan & Ors. v. Licensing Justices of Aylesford*[3], *K. A. Ibrahim v. Public Prosecutor*[1], *Taylor v. Oram*[7], *Pletts v. Beattie*[5], *Pletts v. Campbell*[6], *Pasquier v. Neale*[4] and *Jones v. Mighall*[2].

Griffith-Jones (for the Crown) argued that even if S. 310 gave the Court no power to make any order on an appeal against sentence only, S. 322 gave the Court, on revision, all the powers contained in S. 310,

and these powers could, in such circumstances, be subject to no qualification as to the nature of an appeal, as they were exercisable whether or not any appeal was lodged by either party to the proceedings. On the propriety of the conviction, he agreed that if the waiter was found, on the facts, to be the agent of the customer, no offence was committed, but contended that the fact that the waiter purchased the beer for 70 cents, and charged the customer $1.00 therefor, negatived this view and argued a sale by the waiter to the customer in the cafe. He quoted the judgment of Thorne, Acting C.J. in the "Ibrahim case" as to the responsibility for the loss which would have been incurred had the bottle of beer been broken on the way from the beer shop to the Cafe, maintaining that such loss would not have been debited to the customer. It was common ground that the proprietor of the Cafe provided glasses and other facilities for the consumption of the beer on his premises, even if, as was unbelievable, he derived no profit from the practice and therefore the conviction was sound.

Cur. Adv. Vult.

Terrell, Ag. C.J.—This was an appeal by the Public Prosecutor against the adequacy of sentence. The matter having been brought to my knowledge in this way, I have power to reconsider the legality of the conviction, as on a revision, under the provisions of section 322 of the Criminal Procedure Code, and I propose acting thereunder.

The accused was charged with permitting to be sold by retail or offered to be sold by retail intoxicating liquor on the premises of the Monico Cafe contrary to the provisions of section 38 of the Liquors Revenue Ordinance (Chapter 225).

The facts of the case are not seriously in dispute. On the 30th August, 1940, two customs officers Messrs. Lewin and Shaw, entered the Monico Cafe shortly after midnight, and after refusing anything to eat were offered soft drinks. Mr. Lewin then asked for a bottle of Allsops beer. The Chinese boy asked for a dollar which Mr. Lewin gave him. The boy handed the $1.00 to another Chinese who went across Orchard Road where he purchased and paid for a bottle of Allsops beer from Chop Seng Huat. The price was 70 cents but as Mr. Lewin received no change, the boy appropriated 30 cents either illegally or with Mr. Lewin's tacit consent. The boy's conduct is not in issue in these proceedings, since there is no presumpton under the Ordinance that the proprietor of the cafe is liable for the unauthorised acts of his servants or agents. What the prosecution have to prove is that the proprietor permitted the sale of intoxicating liquor on his premises. In my opinion there is no evidence whatever that he did so. The sale of the beer was completed at Chop Seng Huat where the money was paid. There is no evidence from which a resale at the Cafe can be inferred. The defendant produced his bills and his books, which were not challenged, and proved conclusively that the price of intoxicating liquors was not entered on a customer's bill and that the proprietor made no profit on the transactions. In view of this evidence a resale at the cafe has been clearly negatived. The procedure followed was that which is habitually followed by unlicenced restaurants in London, and which is never challenged when the proprietor has no financial interest in the transaction.

The accused admitted that beer was *consumed* on the premises and admitted in cross-examination that such beer was consumed on the premises with his permission. In referring to this part of the accused's evidence the learned Magistrate in his grounds of judgment speaks of the "scandalous and callous manner in which the accused permitted beer to be *sold* at the Cafe Monico". It is clear that the learned Magistrate has misquoted the evidence and gravely misdirected himself. It is the sale not the consumption of beer on unlicenced premises, which is an offence under the Ordinance.

The conviction therefore must be set aside and the fine and costs repaid.

At the commencement of the appeal I questioned whether there was any jurisdiction under section 310 of the Criminal Procedure Code to entertain an appeal by the Crown to enhance a sentence. Subsection (a) deals with an appeal from an order of acquittal, subsection (b) with an appeal from a conviction, and subsection (c) with an appeal from any other order. The section was until 1936 almost exactly the same as section 316 of the Criminal Procedure Code of the F.M.S., whereby Enactment 19 of 1936 subsection (b) was amended so as to commence;

> "(b) in an appeal from a conviction, or in an appeal as to sentence".

As the learned D.P.P. was not ready to meet this point, and as in the view I have taken of the merits of the case a ruling is unnecessary, I give no decision thereon.

Conviction quashed.

Solicitors for accused—*Braddell Brothers.*